Nos. 80-1137, 80-1145 and 80-1178

In the Supreme Court of the United States

OCTOBER TERM, 1980

APPALACHIAN INSURANCE CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

AID INSURANCE CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

AETNA INSURANCE CO., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners seek reimbursement from the United States for millions of dollars in insurance claims they paid as a

result of the 1976 collapse of the uncompleted Teton Dam. The United States moved to dismiss the suit under Section 3 of the Flood Control Act of 1928, 33 U.S.C. 702c. That Section provides, in pertinent part, that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * * ." The United States District Court for the District of Idaho denied the motion, holding that Section 702c immunity applies solely to federal flood control projects and finding that the Teton Dam was neither designated nor actually operating as such a project (Pet. App. A-12 to A-13)[1]. On interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals reversed, concluding that the Teton Dam was indeed a flood control project (Pet. App. A-3 to A-5) and rejecting various other arguments advanced by petitioners (*id.* at A-5 to A-7).

The court of appeals' decision is correct and we rely fully on its reasoning. There is no conflict among the circuits nor any other reason for further review.

1. 33 U.S.C. 702c, on its face, creates an unqualified immunity: the United States is exempt from "liability of any kind * * * for any damage from or by floods or flood waters at any place * * * ." In enacting the statute, Congress "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954). Therefore, inasmuch as the damage suffered by petitioners' insureds indisputably was caused by the collapse of the Teton Dam and the resulting flood, the court of appeals need not have looked beyond the plain language of Section 702c to hold the United States immune from liability.

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[1]"Pet. App." refers to the appendices in No. 80-1137.

Instead, the court of appeals gave petitioners the benefit of a judicial gloss limiting the statute's applicability to flood losses connected to government flood control projects. Petitioners, relying on the failure of the Teton Dam Authorization Act (Pub. L. No. 88-583, 78 Stat. 925) to specify flood control as a purpose to be served by the Teton Dam, argue that the dam should not be considered a flood control project. However, the Authorization Act's legislative history makes plain that flood control was a major factor underlying the dam's construction. See, *e.g.*, H.R. Rep. No. 1715, 88th Cong., 2d Sess. 3-4 (1964) ("[T]he project would also provide substantial flood protection * * *."); S. Rep. No. 1127, 88th Cong., 2d Sess. 3 (1964) ("[T]he disastrous flood of February 1962 dramatically reemphasized the need for the construction proposed."). There is not the slightest evidence that Congress ever disavowed this flood control purpose. In short, as the court of appeals held (Pet. App. A-5), "[f]lood control was beyond question a purpose of the Teton Basin Project." Accordingly, if a flood control nexus is necessary to trigger the government's Section 702c immunity, the court of appeals correctly found that the nexus exists here. See also *Trout Unlimited* v. *Morton*, 509 F. 2d 1276, 1279 (9th Cir. 1974).[2]

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[2]The court of appeals also correctly rejected petitioners' argument that Section 702c applies only where the sole or primary purpose of a water project is flood control and the sole agency involved in furthering that purpose is the Army Corps of Engineers (Pet. App. A-3 to A-4). The courts of appeals consistently have held that the government is immune from liability for flood damages in circumstances where the water project has multiple purposes and is operated by agencies other than or in addition to the Corps of Engineers. See, *e.g.*, *Taylor* v. *United States*, 590 F. 2d 263 (8th Cir. 1979); *Lenoir* v. *Porters Creek Watershed Dist.*, 586 F. 2d 1081 (6th Cir. 1978); *McClaskey* v. *United States*, 386 F. 2d 807 (9th Cir. 1967). Were the rule otherwise, the root policy of Section 702c—to enable the government to engage in expensive flood control projects without fear of unbounded monetary liability—would, as the court of appeals recognized (Pet. App. A-4,

2. Petitioners also argue that Section 702c does not immunize the government from liability for floods resulting solely from negligence. Petitioners contend that the immunity comes into play only where "natural" flooding caused the loss. However, every court of appeals to consider this argument has rejected it. See, *e.g.*, *Burlison* v. *United States*, 627 F. 2d 119, 121 (8th Cir. 1980); *Florida East Coast Ry.* v. *United States*, 519 F. 2d 1184, 1191 (5th Cir. 1975); *Parks* v. *United States*, 370 F. 2d 92, 93 (2d Cir. 1966); *Stover* v. *United States*, 332 F. 2d 204, 206 (9th Cir.), cert. denied, 379 U.S. 922 (1964). These decisions make obvious sense. Congress intended in Section 702c to immunize the government from flood-related expenditures beyond those authorized for the construction of flood control projects, not to increase the government's financial exposure by imposing liability for negligent construction. As the court of appeals recognized, petitioners' proposed distinction between natural and man-made floods "would necessarily frustrate section 702c's purpose of permitting the government to engage in flood control without fear of liability," and would "lead the court into the morass of 'contributing causes,' 'superseding causes', and 'intervening causes' " (Pet. App. A-6).

3. Petitioners' argument that Section 702c applies only to Mississippi River flood control projects is equally insubstantial. Every court to consider the question has ruled that,

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A-6), be defeated. The Fourth Circuit's decision in *Hayes* v. *United States*, 585 F. 2d 701 (1978), upon which the petitioners in No. 80-1145 rely, does not dictate a contrary result. In refusing to affirm the district court's dismissal of the complaint based on the government's immunity, the *Hayes* court held that to the extent flood damages result from the operation of a multi-purpose water project for recreational purposes, the government is not entitled to Section 702c immunity. Whatever the merits of that decision, it is inapplicable here since the Teton Dam was still under construction when it collapsed and was not being operated for any particular purpose.

although the 1928 Act of which Section 702c was a part was aimed at projects on the Mississippi River, the immunity provision broadly applies to all government flood control efforts. See, *e.g.*, *Lenoir* v. *Porters Creek Watershed Dist.*, 586 F. 2d 1081, 1086 (6th Cir. 1978); *Callaway* v. *United States*, 568 F. 2d 684, 686 (10th Cir. 1978). Moreover, many courts have held that the 1936 Flood Control Act re-enacted the 1928 immunity provision and independently made it applicable to all flood projects. See, *e.g.*, *National Mfg. Co.* v. *United States, supra*, 210 F. 2d at 270. And "[m]ost persuasive perhaps is the plain language of [33 U.S.C. 702c] itself. It applies to floods 'at any place.' " *Lenoir* v. *Porters Creek Watershed Dist.*, *supra*, 586 F. 2d at 1086 n.4. As the court of appeals observed (Pet. App. A-5), it is too late in the day for the courts to abandon this settled line of precedent, upon which millions of dollars in federal flood control investments rest. Cf. *Flood* v. *Kuhn*, 407 U.S. 258, 282-285 (1972).[3]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[3]Petitioners' various other arguments also lack merit. We comment only on their view that the Teton Dam Disaster Assistance Act, Pub. L. No. 94-400, 90 Stat. 1211, repealed by implication the government's Section 702c immunity in this case. That Act compensated all those suffering personal or property loss from the Teton Dam disaster, but expressly excluded insurance companies. Although Congress left the insurance companies free to file Federal Tort Claims Act suits, the Assistance Act nowhere suggests that such suits would not be subject to the usual defenses, including, of course, any immunity the government might enjoy.

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